

No. 82-915

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

CLYDE R. DONNELL, *et al.*,  
v. *Petitioners,*

UNITED STATES OF AMERICA,  
and

EDDIE THOMAS, SR., *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF IN OPPOSITION ON BEHALF OF  
EDDIE THOMAS, SR., ET AL.

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**BRIEF IN OPPOSITION ON BEHALF OF  
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---

Respondents, Eddie Thomas, Sr., et al., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the District of Columbia Circuit in this case. That opinion is reported at 682 F.2d 240.

**STATEMENT**

The members of the Warren County, Mississippi, Board of Supervisors instituted this action in the District Court for the District of Columbia seeking preclearance, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, of their 1978 county redistrict-

ing plan. This plan was adopted after the Attorney General objected to the Board's 1970 plan for racial gerrymandering, the Board ignored the Attorney General's objection and held elections under that plan, and the Justice Department was forced to file suit to enforce its objection and enjoin implementation of the 1970 plan. See *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977).

The District Court for the District of Columbia permitted seven black Warren County voters—respondents here—to intervene in this action to protect their rights to a nondiscriminatory county redistricting plan, and extensive evidence in this case, including trial depositions, interrogatories, and requests for admission, was developed by intervenors. After approximately a year and a half of almost continuous discovery and taking of evidence, which included 36 depositions (most of them taken by the Board) and the accumulation of a record of more than 2,500 pages, the case was submitted to the three-judge District Court on the record already developed, oral argument, and briefs. On July 31, 1979, the District Court found that the Board had gerrymandered black voting strength in Warren County by unnecessarily splitting up black population concentrations among four of the five irregularly-shaped districts, had reduced existing levels of black voting strength, and had deprived black citizens, who constituted approximately 40% of the county's population, of the opportunity to elect candidates of their choice in any of the five districts. Finding that the Board had failed to prove that the new plan was not racially discriminatory in purpose or effect, the District Court denied approval of the new plan. This Court summarily affirmed. *Donnell v. United States and Eddie Thomas, Sr.*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980).

Intervenors then moved the District Court for an attorneys' fees award of \$89,109.38, and in support of the mo-

tion submitted extensive affidavits setting forth detailed records of the time logged and services rendered (Pet., Appendix B, p. 21a), and the customary hourly rates charged for similar work by District of Columbia attorneys showing the reasonableness of the fee request. Also submitted were copies of billings by the three attorneys for the Warren County Board of Supervisors showing that the number of billable hours charged by the Board's attorneys to the county was almost twice the number of hours claimed by the intervenors' attorneys.<sup>1</sup> The Board never raised any specific objection to the number of hours claimed by three of intervenors' attorneys, Frank R. Parker, Barbara Y. Phillips (for preparing the fees motion), and Richard Kohn, but instead concentrated their objections on the hours claimed by James Winfield, a black Vicksburg attorney, and allegations of duplication of work with Justice Department attorneys, who represented the named defendants (see 682 F.2d at 249-50). The District Court reduced the number of hours for Mr. Winfield in two instances in which the Board questioned his presence at depositions, reduced the hourly rates requested for the attorneys living in Mississippi to accord with Mississippi hourly rates, and awarded a total of \$73,669.88, more than \$15,000 less than the amount requested.

The Court of Appeals (per Wilkey, J.) reversed and remanded, holding: that the District Court must hold an evidentiary hearing, determine whether intervenors made a "substantial contribution" to the litigation (682 F.2d at 247-48), and scrutinize the number of hours worked by Mr. Winfield (*Id.* at 250-51); that counsel for intervenors (except Mr. Winfield, whose expertise was in Warren County) were entitled to the customary hourly rates in the jurisdiction in which the action was filed and heard (*id.* at 251-53); and that the District

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<sup>1</sup> County records showed that the attorneys for the Board billed Warren County for 1,136.8 hours of work (R. 145), while attorneys for the intervenors requested fees for only 649.4 hours of work.

Court must reexamine its basis for adjustments to the lodestar amount (hours times hourly rate) (*id.* at 253-55). Since, at the Board's request, the District Court has stayed further proceedings pending disposition of the petition for certiorari, no further evidentiary hearing or other action by the District Court has been taken.

## REASONS WHY THE WRIT SHOULD BE DENIED

### Summary

The decision of the Court of Appeals is not a final decision in this case, but remands the case back to the District Court to reassess intervenors' "general entitlement to attorneys' fees in the case" (*id.* at 255), and, if fees are appropriately granted, to conduct an evidentiary hearing to determine the amount. The Court of Appeals' decision therefore is interlocutory only, and review by certiorari at this stage would violate this Court's general policy against piecemeal, interlocutory review of nonfinal judgments. Absent a final determination by the District Court on intervenors' entitlement to fees in this case, the questions of the proper legal standards to be applied for determining the "prevailing party" and the "special circumstances" which would render an award unjust are not yet ripe for determination by this Court.

Contrary to petitioner's contentions, there is no conflict between the lower court decision and the decisions of other Circuits or within the Circuit, and no important question of Federal law is presented, on the legal issues of whether duplicative hours should be compensated or the proper determination of the hourly rate for out-of-town attorneys. The decision below is consistent with other Circuits and other decisions within the Circuit on these issues. Petitioners concede that there is no conflict among the Circuits on the issues of the hourly rate for public interest lawyers and whether an evidentiary hearing should be held and, on the facts of this case, these issues fail to present an important question of Federal law which this Court should resolve in this case.

**I. THE PETITION SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW IS INTERLOCUTORY AND NOT FINAL.**

Petitioners' request for review of the Court of Appeals' decision violates the general policy of this Court of refusing to review nonfinal judgments, such as one remanding the case back to the District Court for a new trial. *Washington v. Fishing Vessel Association*, 443 U.S. 658, 688 n.30 (1979) (issue upon which the District Court has not yet reached a final decision not fairly subsumed within certiorari); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of final District Court judgment on remand "of itself alone furnished sufficient ground for the denial" of certiorari). See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 300 (5th ed. 1978). Because there is no final order from the District Court in this case, and because the Court of Appeals' mandate directs the District Court to make further determinations and to hold a further evidentiary hearing on certain factual issues, the judgment below is interlocutory only, and certiorari should be denied. The legal issues raised by petitioners will be preserved for review after final District Court action on remand. Indeed, some of the issues presented by petitioners may be eliminated from the case, depending upon the action of the District Court on remand.

**II. THE STANDARD FOR DETERMINING A PREVAILING PARTY AND THE ISSUE OF WHICH "SPECIAL CIRCUMSTANCES" WOULD RENDER AN AWARD TO INTERVENORS UNJUST SHOULD NOT BE REVIEWED BY THIS COURT PRIOR TO A FINAL JUDGMENT BY THE DISTRICT COURT UPON REMAND.**

A prevailing party should ordinarily recover attorneys fees unless "special circumstances" would render such an

award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) (legislative history of 42 U.S.C. § 1937l(e)). The Court of Appeals in this case treated the intervenors as prevailing parties, Pet., Appendix A at pp. 6a-7a, but held that special circumstances would render an attorneys' fees award unjust unless the intervenors "contributed substantially to the success of the litigation." *Id.* at p. 12a.

Petitioners mistakenly refer to this "substantial contribution" test as a holding on the prevailing party issue (Pet. at pp. 8-9), when it actually deals with the "special circumstances" exception. Pet., Appendix A at pp. 10a-12a. Similarly, those portions of the cases which petitioners cite as being in conflict with the Court of Appeals below on the prevailing party issue (*id.* at pp. 7-10) deal with matters other than who is the prevailing party, and in no way contradict the Court of Appeals below on the prevailing party issue.<sup>2</sup>

To the extent that the problem revolves around the "special circumstances" exception, respondents believe that the "substantial contribution" test articulated below is much too strict for intervenors in such cases to have to meet, is not in keeping with the congressional purpose and legislative history of 42 U.S.C. § 1973l(e) and 42 U.S.C. § 1988,<sup>3</sup> and is in conflict with the Ninth Cir-

<sup>2</sup> The portions of *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 102 S.Ct. 3187 (1982), cited by petitioners, referred to the special circumstances question, 633 F.2d at 1348, as did those from *Commissioners Court of Medina County v. United States*, 683 F.2d 435, 442-443 (D.C. Cir. 1982). In *E.E.O.C. v. Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980) and *Lipscomb v. Wise*, 643 F.2d 319 (5th Cir. 1981), the intervenors had been declared prevailing parties, and the only questions addressed by the Courts were what amount of fees should be awarded and which particular attorneys for the intervenors should receive awards.

<sup>3</sup> See S. Rep. No. 295, 94th Cong., 1st Sess. 40 n. 42 (1975) (42 U.S.C. § 1973l(e)); S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (42 U.S.C. § 1988).

cuit's decision in *Seattle School District*.<sup>4</sup> However, review by this Court is unnecessary at this time because respondents will probably demonstrate upon remand to the District Court that they have, in fact, made a substantial contribution to the instant litigation, and will recover the fees to which they are entitled. If that happens, review on this issue will no longer be of immediate practical importance to the respondents, and any appeal by the petitioners will address only the factual question of whether respondents met the "substantial contribution" standard. And if the District Court finds that respondents do not meet the substantial contribution test, the propriety of this test as a matter of law can be pursued through appeal and a petition for certiorari, with the aid of a District Court ruling illustrating the practical application of the test.

### **III. THERE IS NO CONFLICT AMONG THE CIRCUITS OR WITHIN THE DISTRICT OF COLUMBIA CIRCUIT ON THE LEGAL ISSUE OF WHETHER DUPLICATIVE HOURS SHOULD BE COMPENSATED.**

In Section III of the Petition, petitioners state that the Court of Appeals below held that once fees are awardable, all hours requested by counsel—whether duplicative or not—should be compensated. (Petition at p. 10).<sup>5</sup> This interpretation of the Court's holding is ridiculous. In actuality, the Court ruled in conformity with the other Court of Appeals decisions cited by the

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<sup>4</sup> In *Seattle*, fees were denied the intervenors for their "*de minimis*" role in the resolution of the issue upon which the ultimate result rested, but were awarded for work on another issue which was never resolved. That would appear to conflict with the Court of Appeals' decision here, since work on an unresolved issue would not seem to have "contributed substantially to the success of the litigation." Appendix A at 12a.

<sup>5</sup> The title of Section II of the petition appears to cover the Courts of Appeals' treatment of the entire "special circumstances" issue, but the substance deals only with the matter of duplicative hours.

petitioner that unnecessarily duplicative hours are not compensable, even though there is some award made. Thus, there is no conflict among the Courts to be resolved on this issue.

After devoting a whole section of its opinion to the issue of "entitlement to fees," the Court of Appeals below wrote a subsequent and entirely separate section on "calculations of the fees." If petitioners' interpretation were correct, there would have been no need for this second section inasmuch as all requested hours would be compensated once overall entitlement were shown. Contrary to petitioners' statement, the Court said that even if entitlement were shown in this instance because "intervenor's participation in the case was important and substantial," the question remained of whether all of the claimed hours were justified "given the central role played by four attorneys from the Department of Justice." Pet., Appendix A at 16a. Moreover, the Court of Appeals, while affirming the District Court's factual determination that the claimed hours of two of intervenors' attorneys were reasonable, remanded for an evidentiary hearing as to the time charged by Mr. Winfield, specifically instructing the District Court to review petitioners' objections about allegedly duplicative time entries on the part of Mr. Winfield.

Clearly, the Court of Appeals below held that unnecessarily duplicative hours should not be compensated. This coincides with the rulings of other Courts of Appeals on this issue. Petitioners' only complaint, then, would revolve around that portion of the Court of Appeals' ruling affirming the District Court's finding that all hours claimed by two of the three attorneys for the intervenors were reasonable. That is a pure question of fact, committed to the District Court's discretion, and not appropriate for review on a writ of certiorari.<sup>6</sup>

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<sup>6</sup> Contrary to petitioners' contentions, (Pet., pp. 11-12), for its factual determination that the number of hours claimed by inter-

#### IV. THERE IS NO CONFLICT IN CIRCUITS AS TO A PROPER DETERMINATION OF THE HOURLY RATE FOR OUT-OF-TOWN ATTORNEYS.

The Court of Appeals below held that out-of-town counsel, with some exceptions, should be compensated at the going rate for attorneys in the district in which the action is filed and heard, whether that rate be higher or lower than the going rate in the attorney's hometown. Pet., Appendix A at p. 18a. As the Court noted, this "is a neutral rule which will not work to any clear advantage for either those seeking attorneys' fees or those paying them." *Id.* It is totally in harmony with the cases which petitioner erroneously contends are conflicting: *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. pending*, No. 81-2135, and *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982) (en banc). Both of these cases held that the rate which normally should be applied is that which exists in the area where the District Court hears the case.<sup>7</sup>

Petitioners seek a rule which would always limit out-of-town civil rights attorneys to whichever fee is *lower*.

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venors' attorneys (other than Mr. Winfield) was reasonable (Pet., Appendix B, p. 31a), the District Court had before it, not only affidavits of counsel, but also the entire record in the case, including the performances of counsel at depositions, the separate pleadings, interrogatories, requests for admissions, and the like, filed by counsel for intervenors which were not filed by the Justice Department attorneys, and the separate briefs. This Court long ago observed that a trial judge "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees v. Greenough*, 105 U.S. 527, 537 (1882). Accordingly, because of the trial court's greater familiarity with the record and proceedings before it, its determination of what is reasonable in awarding fees can be reversed on appeal only if it represents an abuse of discretion. See, e.g., *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc).

<sup>7</sup> In both cases, the Court held that higher-priced out-of-town attorneys should be limited to the local rate unless it was necessary to look out-of-town to find attorneys with the requisite expertise and desire to handle the litigation.

This is not the rationale behind *Chrapliwy* or *Avalon Cinema*, and such a rule would contradict the express Congressional purposes of 42 U.S.C. §§ 1973l(e) and 1988, which are to encourage vigorous and competent civil rights advocacy.

**V. THE ISSUE OF WHETHER PUBLIC INTEREST LAWYERS SHOULD RECEIVE THE SAME HOURLY RATES AS MEMBERS OF THE PRIVATE BAR DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD OCCUPY THIS COURT'S TIME.**

Petitioners contend, rather incredibly, that attorneys employed by public interest organizations should receive compensation at lower rates than members of the private bar. Before addressing the lack of merit in this contention, it should be noted that petitioners never raised this argument in the Court of Appeals below. Indeed, their brief to the Court of Appeals said: "There is no disagreement between the parties that . . . although some individuals seeking an award are salaried employees of a public-interest organization, the factor is *irrelevant*, *Copeland v. Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc). . . ." (Brief for Appellants at pp. 4-5) (emphasis added). Where the petitioners never allowed the Court of Appeals to review this issue, and where they took the opposite position in the Court of Appeals from that which they presently take, the petition for certiorari should be denied.

Moreover, petitioners' current position clashes directly with this Court's statement that representation by a public interest group is not a "special circumstance" justifying a denial of fees. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980). Surely, if representation by a public interest group does not justify a denial of fees, there is nothing in logic which would dictate that such representation justifies a reduction in the *amount* of fees. See also, H.R. Rep. No. 94-1558, 94th Cong., 2d

Sess. 8 n.16 (“[A] prevailing party is entitled to counsel fees even if represented by an organization . . .”). In fact, petitioners’ position runs directly counter to the Congressional purpose of encouraging vigorous and competent representation by civil rights advocates. As noted in the legislative history of 42 U.S.C. § 1988:

It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

Petitioners attempt to mislead this Court into believing that the District of Columbia Circuit provides one method of proving the amount of attorneys’ fees for public-interest lawyers, and a distinct and stricter method for members of the private bar. (Petition at pp. 15-16, citing separate passages from *National Ass’n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325, 1326 (D.C. Cir. 1982)). This is just not correct. The cited statements from *National Association of Concerned Veterans* prescribe requirements of proof for *all* lawyers, public interest and private, and create no distinctions.

**VI. THE NECESSITY OF HOLDING AN EVIDENTIARY HEARING WHEN A FEE REQUEST IS OPPOSED DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND NEED NOT BE DECIDED IN THE CONTEXT OF THIS CASE WHERE THE COURT OF APPEALS HAS REMANDED WITH INSTRUCTIONS TO HOLD AN EVIDENTIARY HEARING.**

Part VI of the petition is preceded with a heading asking this Court to review “the issue of the exact scope of responsibility of a district judge when a fee request is opposed.” That issue need not be decided since it is clear what the District Judge’s responsibility is: to determine

whether attorney's fees should be awarded and how much. As the text of Section VI of the petition indicates, what petitioners really seek is review of the question of when an evidentiary hearing should be held.

This case is particularly inappropriate for such review inasmuch as the Court of Appeals has remanded this action to the District Court with specific instructions to hold an evidentiary hearing regarding the reasonableness of the hours claimed by one of the three lawyers for the intervenors. The question of whether an evidentiary hearing should be held when attorneys' fees applications are opposed is not relevant to this case—a hearing *is* going to be held upon remand.

Petitioners' real complaint is that the hearing is only going to cover the reasonableness of the hours of Attorney Winfield and not Attorney Parker. However, the only specified objection to Parker's hours raised by petitioners is that they are duplicative of hours claimed by Winfield. (Petition at p. 18, n.24). If this objection is valid, it can be cured by striking the hours claimed by Winfield for work that was done by Parker alone. The Court of Appeals specifically affirmed the District Court's finding that Parker's claimed hours are reasonable, noting that petitioners failed to specify their challenge to Parker's hours. By holding, upon remand, a hearing which covers Winfield's hours and not Parker's, the District Court will be doing what all trial courts do—limiting the evidence to issues where there is a reasonable dispute of fact. Complaints about such a limitation are not the stuff of writs of certiorari.

Even outside the context of this case, there is little need for this Court to address the issue of whether and when an evidentiary hearing should be held on motions for attorneys' fees. Some disputes over fees can be resolved by the District Court by a simple review of the record and the affidavits; others may require full-blown evidentiary hearings; still others can be taken care of by

some procedure that falls in between these two poles. It is a matter best determined by the District Court in the particular instance. The wide variety of disputes over attorneys' fees would not be efficiently handled by a set rule emanating from this Court which would limit the discretion of the District Courts as to when hearings are necessary and when they are not.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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